Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD RICHARD LOWERY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's Fourteenth Amendment due process rights were violated and whether the Petitioner's no contest plea was entered knowingly, intelligently, and voluntarily when the plea colloquy was conducted simultaneously with four other defendants (appearing on unrelated cases) and when the trial court failed to inform the Petitioner about the constitutional rights that he was waiving as a result of his no contest plea (the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination).

2. Whether the Petitioner was denied his right to effective assistance of counsel as set forth in the Sixth Amendment when defense counsel failed to inform the Petitioner that the charges contained in the amended plea agreement were barred by the applicable statute of limitations.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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IN THE

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RONALD RICHARD LOWERY,
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STATE OF FLORIDA,
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On Petition for Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

The Petitioner, RONALD RICHARD LOWERY, respectfully prays the Court to issue its writ of certiorari to review the judgment of the Florida First District Court of Appeal entered in this case on December 18, 2006 (Pet. App. 1a), rehearing denied on March 16, 2007 (Pet. App. 2a).

D. CITATION TO OPINION BELOW

Lowery v. State, 951 So. 2d 835 (Fla. 1st DCA 2006).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida First District Court of Appeal rendered on December 18, 2006 (Pet. App. 1a), rehearing denied on March 16, 2007 (Pet. App. 2a).

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law."

G. STATEMENT OF THE CASE

In 2000, Ronald Richard Lowery (hereinafter "Petitioner Lowery") was charged in Okaloosa County, Florida, with one count of sexual battery on a child under twelve years of age (a capital

felony). *See* § 794.011(2)(a), Fla. Stat. Subsequently the State of Florida (hereinafter "the State") negotiated a plea agreement to the lesser charge of attempted sexual battery (count 1), *see* § 777.04 & § 794.011(2), Fla. Stat., and a new charge of lewd and lascivious conduct on person under sixteen years of age (count 2). *See* § 800.04, Fla. Stat. On September 6, 2001, Petitioner Lowery entered a no contest plea to the amended information and was sentenced to thirty years' imprisonment on count 1 and fifteen years' probation on count 2; the sentences were ordered to be served consecutively. (Pet. App. 3a-10a). Notably, at the plea hearing, Petitioner Lowery entered his no contest plea simultaneously with the no contest pleas entered by four other defendants. Petitioner Lowery did not appeal the convictions or sentences.

On April 18, 2003, Petitioner Lowery timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Petitioner Lowery raised several claims in the motion, two of which are relevant to this petition: (1) the plea colloquy was constitutionally defective and (2) defense counsel rendered ineffective assistance of counsel and/or Petitioner Lowery's

no contest plea was not knowingly, intelligently, and voluntarily entered because defense counsel never advised Petitioner Lowery regarding the statute of limitations defense.[1]

A postconviction evidentiary hearing was held on April 27, 2004, and May 4, 2004. At the evidentiary hearing, the parties stipulated that the charges for which Petitioner Lowery entered his no contest plea (attempted sexual battery and lewd and lascivious conduct) were barred by the applicable statute of limitations (although there was no statute of limitations for the original charge of capital sexual battery, *see* § 775.15(1)(a), Fla. Stat). The attorney who represented Petitioner Lowery at the plea hearing testified at the evidentiary hearing and admitted that he *did not* inform Petitioner Lowery that the charges included in the plea agreement were barred by the statute of limitations. On December 3, 2004, the state trial

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[1] *See* Sup. Ct. R. 14(1)(g)(i). Both of these postconviction claims presented federal questions (i.e., the denial of due process in light of the insufficient plea colloquy and the denial of effective assistance of counsel due to counsel's failure to properly advise Petitioner Lowery regarding the statute of limitations defense). Both of these claims were raised in Petitioner Lowery's state postconviction motion and again raised in the appellate briefs pursuant to the appeal of the state trial court's order denying Petitioner Lowery's postconviction motion. Both claims were denied by the state trial court (Pet. App. 11a) and the state trial court's denial was affirmed by the state appellate court. (Pet. App. 1a).

court denied Petitioner Lowery's postconviction motion. (Pet. App. 11a).

Petitioner Lowery appealed the denial of the postconviction motion to the Florida First District Court of Appeal. On December 18, 2006, the state appellate court *per curiam* affirmed the state trial court's order (without a written opinion). *See Lowery v. State*, 951 So. 2d 835 (Fla. 1st DCA 2006); Pet. App. 1a.[2] Petitioner Lowery remains incarcerated.

H. REASONS FOR GRANTING THE WRIT

1. The first question presented is important and has an impact on all criminal prosecutions nationwide.

Petitioner Lowery's plea colloquy took place simultaneously with four other defendants – defendants whose cases were totally unrelated to Petitioner Lowery's case.[3] (Pet. App. 3a-10a). In *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969), this Court explained:

A defendant who enters [a guilty plea] waives

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[2] Because the state appellate court issued a *per curiam* affirmed opinion, Petitioner Lowery was not entitled to seek discretionary review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Insurance Corp. v. Davis*, 392 So. 2d 1304, 1304-05 (Fla. 1980).

[3] Notably, Petitioner Lowery's attorney also represented one of the other defendants at the plea hearing. (Pet. App. 3a-10a).

> several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege.

(quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).[4] During the plea colloquy in Petitioner Lowery's case, the state trial court failed to mention any of these rights (i.e. the state trial court did not mention Petitioner Lowery's privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers). (Pet. App. 3a-10a). The plea hearing transcript does not show that Petitioner Lowery or the other defendants were placed under oath prior to answering questions from the state trial court. There was no determination on the record that Petitioner Lowery understood the nature of the charges or the maximum penalty provided by law. Finally, there was no mention on the record that Petitioner Lowery had the right to appeal his judgment and conviction.

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[4] In *Boykin*, the Court explained that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242.

In *Boykin*, the Court held that "[w]hat is at stake for an accused facing . . . imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. 243-44.[5] Clearly the plea colloquy in the instant case does not satisfy this standard. The record does not show a knowing, intelligent, and voluntary waiver of Petitioner Lowery's constitutional rights.[6]

This case affords the Court an opportunity to address an

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[5] The Court in *Boykin* added:

> [A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.

Boykin, 395 U.S. at 242-43 (footnote omitted).

[6] The state trial court denied Petitioner Lowery's attack on the plea colloquy because the state trial court held that Petitioner Lowery signed a written plea agreement. (Pet. App. 18a). Although Petitioner Lowery signed a written plea form, the record establishes that he only reviewed and signed one page of the form. Moreover, the record is undisputed that words were added to the form after Petitioner Lowery signed the form. As the Court warned in *Boykin*, "If [] convictions are to be insulated from attack, the trial court is best advised to conduct an *on the record* examination of the defendant which should include, *inter alia*, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences." *Boykin*, 395 U.S. at 244 n.7 (emphasis added).

issue that has a potential impact on all criminal prosecutions nationwide. *See Boykin*, 395 U.S. at 244 n7 ("A majority of criminal convictions are obtained after a plea of guilty."). As the country's population grows and judicial resources are stretched, the court system is faced with a temptation to place efficiency above thoroughness – especially during plea colloquies. Trial judges assigned to criminal divisions are faced with crowded dockets and oftentimes are pressed for time to resolve cases. Nonetheless, efficiency should never trump a defendant's constitutional rights. Whether to enter a no contest plea and accept a sentence of thirty years' imprisonment was the most important decision in the life of Petitioner Lowery. Yet Petitioner Lowery was forced to make this decision during a "cattle call" plea colloquy (i.e, the same attorney represented two defendants during a group plea colloquy involving serious felony offenses and the two defendants' cases were in no way related to each other).

The plea colloquy in this case lasted a matter of minutes. None of Petitioner Lowery's constitutional rights were addressed at the hearing. In contrast, in federal court, Federal Rule of Criminal

Procedure 11 ensures that a criminal defendant's due process rights are protected. It is not unusual for a plea colloquy in federal court to last more than an hour. Petitioner Lowery's rights were no different from the rights of any defendant entering a guilty plea in federal court – the same Constitution applies equally to both proceedings. Unfortunately, on September 6, 2001, Petitioner Lowery was not afforded the benefit of his constitutional rights.

A plea colloquy must reflect that the defendant has personally been addressed regarding his or her constitutional rights and has expressed an understanding of those rights. Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea so that the record contains an affirmative showing that the plea was knowing, intelligent, and voluntary. The record in Petitioner Lowery's case does not affirmatively demonstrate that his no contest plea was knowing, intelligent, and voluntary and therefore Petitioner Lowery should be permitted to withdraw his plea. *See Boykin*, 395 U.S. at 243 n.5 ("Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is

therefore void."). Petitioner Lowery suggests that it is appropriate for the Court to once again articulate the minimum requirements under the Constitution for the acceptance of guilty pleas.

Petitioner Lowery respectfully requests the Court to grant the petition for writ of certiorari in order to address this important issue. The need for guidance from this Court on this issue is acute, as the issue has the potential to affect a substantial number of cases in every jurisdiction.

2. The decision below is incorrect.

Petitioner Lowery was originally charged with one count of sexual battery on a child under twelve years of age. The original charge was a capital offense which carries no statute of limitations. However, the State subsequently extended a plea offer to the lesser charge of attempted sexual battery on a child under twelve years of age and a new charge of lewd and lascivious conduct on a person under sixteen years of age. Yet, unbeknownst to Petitioner Lowery, at the time of the plea offer, the amended charges were barred by the applicable statute of limitations. Hence, Petitioner Lowery pled to crimes that the State could not lawfully prosecute. At no time did

defense counsel inform Petitioner Lowery that the amended charges were barred by the statute of limitations.

When Petitioner Lowery learned that the charges to which he pled were barred by the statute of limitations, he timely filed a state postconviction motion alleging ineffective assistance of counsel. In its order denying relief, the state trial court erroneously focused on its conclusion that had Petitioner Lowery proceeded to trial, the statute of limitations defense would not have been available. (Pet. App. 12a-14a).[7]

Although a statute of limitations defense can be waived, *see United States v. Meeker*, 701 F.2d 685, 687 (7th Cir. 1983), the waiver must be knowing, intelligent, and voluntary. *See United States v. Cooper*, 956 F.2d 960, 961-62 (10th Cir. 1992) (holding that the statute of limitations defense under 18 U.S.C. § 3282 must be

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[7] In reaching its conclusion, the state trial court focused on the offense originally charged rather than the offenses of conviction. It makes no difference that the original offense charged (or any possible offenses that could have been charged) did not carry a statute of limitations. The focus is on the offense for which the defendant is convicted. Obviously Petitioner Lowery would not be permitted to raise claims in a postconviction motion to charges that were later amended or dismissed. Similarly, the State and the state trial court should not be permitted to focus on the original charge; the focus must be on the offenses of conviction. It is undisputed that a statute of limitations defense existed for the offenses of conviction.

expressly waived by the defendant). Petitioner Lowery submits that an effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently and voluntarily made. The right not to be convicted of an offense for which prosecution is barred by the statute of limitations is substantive and fundamental. Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental rights. *See Boykin*, 395 U.S. at 243 n.5 ("Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). Waiver of any fundamental right must be express and certain, not implied or equivocal. *See Neufield v. United States*, 118 F.2d 375, 392 n.5 (D.C. Cir. 1941) (stating that courts should safeguard fundamental rights "with meticulous care . . . unless waived by [the defendant] in a manner showing his express and intelligent consent").[8]

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[8] Under Florida law, had Petitioner Lowery proceeded to trial on the original capital sexual battery charge, then the state trial court would have been required to instruct the jury on any applicable lesser-included offense, including

In Petitioner Lowery's case, defense counsel acknowledged that he *did not* discuss the statute of limitations defense with Petitioner Lowery in the context of the amended information and the plea offer extended by the State. Furthermore, during the plea colloquy, there was no mention by either party or the state trial court that Petitioner Lowery would be waiving any defenses as a result of the no contest plea; there is no specific mention of the statute of limitations defense.[9] (Pet. App. 3a-10a). Therefore, it cannot be said that Petitioner Lowery waived the statute of limitations defense, as there is nothing in the record to demonstrate a knowing, intelligent, and voluntary waiver.

The test to be applied by a court when evaluating an ineffectiveness claim is two-pronged: the defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency. *See Strickland v. Washington*, 466

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attempt. Since attempt would have been time-barred, Petitioner Lowery would have been required to waive the statute of limitations defense *on the record*. *See Tucker v. State*, 459 So. 2d 306, 309 (Fla. 1984).

[9] Had defense counsel stated during the plea colloquy that Petitioner Lowery was waiving all defenses pursuant to the negotiated plea, including the statute of limitations defense, then it would have been clear that Petitioner Lowery was waiving the defense and there would be no issue in this case.

U.S. 668, 687 (1984)). The two-part *Strickland* test applies to challenges of no contest pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Pursuant to *Hill*, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that "but for counsel's errors, he would not have pleaded [no contest] and would have insisted on going to trial." *Id.* at 57.

Defense counsel was ineffective for failing to inform Petitioner Lowery of the statute of limitations defense. At the postconviction evidentiary hearing, Petitioner Lowery explained that had he known that the charges set forth in the amended information were barred by the statute of limitations, he would not have entered his no contest plea. Petitioner Lowery's no contest plea was not knowingly, intelligently, and voluntarily entered due to the lack of knowledge of the statute of limitations defense. The withdrawal of Petitioner Lowery's no contest plea is necessary to correct a manifest injustice.

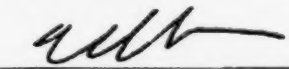
For all of the reasons set forth above, Petitioner Lowery

submits that the decision below is erroneous. Petitioner Lowery respectfully requests the Court to grant the petition for writ of certiorari in order that the Court can further address his claim of ineffective assistance of counsel.

I. CONCLUSION

Petitioner Lowery respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,



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COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD RICHARD LOWERY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Florida First District Court of Appeal

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D05-5344

RONALD RICHARD LOWERY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed December 18, 2006.

An appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Michael Ufferman, Tallahassee, for Appellant.

Charlie Crist, Attorney General, and Charlie McCoy, Senior Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.
AFFIRMED.

WOLF, LEWIS and THOMAS, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

March 16, 2007

CASE NO.: 1D05-5344
L.T. No. : 00-836

Ronald Richard Lowery v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed January 2, 2007, for rehearing, certification and/or written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Michael Robert Ufferman Robert R. Wheeler, A.A.G.

Charlie Mccoy, A.A.G. Hon. Bill Mc Collum, A.G

fl

/S/ Jon S. Wheeler (Seal of First DCA)
JON S. WHEELER, CLERK

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 00-836

RONALD R. LOWERY, ORIGINAL

Defendant.

The above-entitled cause came on for plea and sentencing before the Honorable G. Robert Barron, Circuit Judge, First Judicial Circuit of Florida, at the Okaloosa County Courthouse Annex, Shalimar, Florida, on the 6th day of September, 2001. David Fleet, Assistant State Attorney, appeared on behalf of the plaintiff, and Drew S. Pinkerton, Esquire, appeared on behalf of the defendant, and the following proceedings took place:

COURT: Ronald Lowery, Douglas Townsend, Karl Schiffer, Marshall Boroughs, James Hill. I now have before the Court Mr. Ronald Lowery represented by Mr. Drew Pinkerton, Mr. Douglas Townsend represented by Mr. Drew Pinkerton, Karl Schiffer represented by Mr. Greg Tolar, and Mr. Marshall Boroughs and Mr. James Hill represented by Mr. Charles Wade. Gentlemen, you may proceed with the announcement in each case.

FLEET: Your Honor, at this time the state is amending

the information in State versus Ronald Richard Lowery, filing a new information charging the defendant with attempted sexual battery on a child less than twelve in Count I and Count II, lewd and lascivious assault. Also we are filing a scoresheet in that case. All of this has been provided to the defense. It's based upon the stipulated agreement the defendant will plead no contest or guilty to those charges and receive a sentence as agreed upon by counsel.

PINKERTON: As to Mr. Lowery, he withdraws his previously tendered plea and enters a plea of no contest to the amended information. There's an agreed upon period of incarceration, thirty years department of corrections, followed by fifteen years' probation, $663.00 court cost, cost of supervision of $50.00, $40.00 court facility fee. We'd stipulate to the factual basis for the entry of the plea.

FLEET: Your Honor, the state will also supplement the record and already has done so in the court file as a factual basis using the deposition - - in the court file is the transcripts of the depositions of the witnesses. Counsel has agreed to use that to supplement the record for a factual basis. Also, the state anticipates that the Court's going to declare him a sexual predator -- classify him a sexual predator in accordance with Florida Statutes, order the DNA blood samples, HIV testing, and the only condition of supervision and while he's in custody is that he initiate no contact with the victims or their family with the exception of his two sons.

PINKERTON: Those are all statutory matters that Mr. Fleet just addressed. We also received a copy of the scoresheet as well as the amended information.

(Attorneys announced the plea agreements on Douglas Townsend, Karl Schiffer, Marshall Boroughs, James R. Hill.)

COURT: We now have before the Court Ronald Lowery, Douglas Townsend, Karl Schiffer, Marshall Boroughs and James Hill. You've each heard your attorney announce that you wish to enter a plea under the terms and conditions as related on the record by your attorney. Is it your desire in each of your cases that I accept that plea on your behalf?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Your attorneys filed with the Court a written plea agreement which appears to bear your signature. Did you sign the agreement?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Did you read it before you signed it?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Did you discuss it fully with your attorney?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Do you understand it?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Do you have any questions about it?

LOWERY: No, sir.

TOWNSEND: No, sir.

SCHIFFER: No, sir.

BOROUGHS: No, sir.

HILL: No, sir.

COURT: Are you satisfied with your attorney?

LOWERY: Yes, sir.

TOWNSEND: Yes, sir.

SCHIFFER: Yes, sir.

BOROUGHS: Yes, sir.

HILL: Yes, sir.

COURT: Court finds that the plea in each of these cases has been entered freely and voluntarily, and I will accept the plea. As to Ronald Lowery, the Court will adjudicate him guilty on both counts. Court will impose a sentence of thirty years department of corrections on Count I and fifteen years' probation on Count II. Was the agreement that that probation would run consecutive?

PINKERTON: That's what's contemplated, Judge.

FLEET: Based on that recent ruling, you do have to state sexual offender probation. I know that that's what's contemplated, but that recent ruling requires you to actually state that or to do a written order.

COURT: We'll start over with the announcement on that case. It's going to be adjudication on Counts I and II, guilty. DOC sentence of thirty years on Count I, credit for any time served. Count II will run consecutive to Count I and will be a period of fifteen years' probation in accordance with the terms and conditions set forth on the written plea agreement. Probation shall also include sexual offender terms of probation, and the defendant shall be classified as a sexual predator and required to meet all statutory terms and conditions associated therewith. The other financial terms and conditions of the probationary period shall be as set forth on the plea agreement.

FLEET: Your Honor, before you adjourn, the victims do have a statement to make when it's appropriate.

COURT: All right, sir, thank you.
(Court announced the sentences on Douglas Townsend, Karl Schiffer, Marshall Boroughs and James Hill.)

COURT: Mr. Pinkerton, if you and your client would stay available, the victims did have a statement to make. Mr. Fleet.

FLEET: Your Honor, at this time Miss Linda Strickland, mother of the three girls, would like to make a statement.

STRICKLAND: Ron (unintelligible)

REPORTER: I can't hear her, Your Honor.

STRICKLAND: Ron, congratulations. Today is your big day. You worked hard and long to arrive here in this courtroom on this day. You know what today is for you and I. In Phoenix City, Alabama, you remember in your classroom superlatives what you were voted, and you succeeded. Of all the students, you were voted most likely to go to prison, and you succeeded, you didn't let them down. You used sympathy to keep your wife and children in check. You robbed each of us of precious years. You sacrificed - - we sacrificed much to protect you. Our minds and the children's minds are flooded with memories of betrayal and embarrassment over your lack of self-control. You've been a valiant warrior for Satan. Today you join your own kind. I'm surely sorry for you, Ron. You had it all, and you lost it all. Go today and reap your rewards.

FLEET: Your Honor, Dana Lowery would like to say something also.

D. LOWERY: Growing up the one thing that I was taught, and that for every action you do there's a consequence, and I guess you thought you were invincible. You even tried to pull your sons down with you. I've been thinking a lot this past year as all this has been going on and trying to get past what all you've done, and I finally realized this past week, for me to get past what you've done to me, I'm going to have to forgive you. So at this time I want to tell you that I forgive you for what you did to me. The memories will always be in my mind, but now I'm free from everything. You have no more bondage over me. Mom always said whatever comes out in the darkness - - whatever happens in the darkness comes out in the light, and this is your shining

moment. I wish you would just stand here and admit to what you did so that everybody knows that we're not liars.

COURT: Thank you, Mr. Fleet, and thank you, ladies. Mr. Pinkerton, anything further from you or the defendant?

PINKERTON: No, Your Honor.

COURT: Thank you.

(WHEREUPON THE HEARING WAS CONCLUDED)

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. Case No: 00 CF 836 Division 1

RONALD RICHARD LOWERY,
Defendant.

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE having come before the Court on the Defendant's Amended Motion for Postconviction Relief filed October 28, 2004, and the Defendant's Amended Post Evidentiary Hearing, Memorandum of Law and Fact in Support of Motion for Postconviction Relief also filed October 28, 2004.[1] The Defendant alleged ten grounds of ineffective assistance of counsel in the Amended Motion for Postconviction Relief. The Defendant was represented by Drew S. Pinkerton, Esquire, during all pre-trial matters, the entry of the plea, and the sentencing hearing.

The Defendant was originally charged on or about May

[1] The Amended Motion is merely the codification of the oral amendment made at the evidentiary hearing, attached hereto as Exhibit A.

19, 2000, with a single count of sexual battery (victim less than 12 years) in violation of Florida Statute Section 794.011(2), a capital felony. Pursuant to plea negotiations with the State, on September 6, 2001, the Defendant entered a plea of nolo contendere to the offenses of Count I, Attempted Sexual Battery (Victim under Age 12) and Count II, Lewd and Lascivious Assault on a Child.[2] The Defendant was sentenced to thirty years in the Florida Department of Corrections on Count I. As to Count II, the Defendant received fifteen years probation consecutive to Count I. The Defendant did not appeal the Judgment of Conviction.

The Court conducted an evidentiary hearing on the Defendant's 3.850 Motion on April 27, 2004, which was concluded May 4, 2004.[3] The Court having considered the 3.850 Motion, having heard the testimony and reviewed the evidence presented during the evidentiary hearing, having reviewed the memoranda from both counsel for the Defendant and counsel for the State, and otherwise being fully advised in the premises makes the following findings:

1. As to ground one, the Defendant alleges ineffective assistance of counsel for failure to raise the statute of limitations defense and/or Defendant's no contest plea was involuntary because neither defense counsel nor the court ever advised Defendant Lowery of the statute of limitation defense or that he was waiving the defense. This allegation is without merit.

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[2] Written plea agreement signed by the Defendant and dated September 5, 2001, attached hereto as Exhibit B.

[3] Transcript of evidentiary hearings of April 24, 2004 and May 4, 2004 attached hereto as Exhibit C and D.

The Defendant was originally charged with Sexual Battery of a Victim less than 12 Years of Age,[4] which is a capital felony pursuant to Florida Statute 794.01 l(2)(a); therefore, there would be no statute of limitations applicable to this capital felony if the State were to have proceeded as charged against the Defendant in September 2001 at trial.

Mr. Pinkerton testified during the evidentiary hearing that he received a letter from the State informing him that if the Defendant proceeded to trial the State would proceed on the five count information; therefore, the Defendant was aware that the State would proceed on the capital felonies which are documented by the letter dated August 24, 2001, addressed to the Defendant's counsel, Mr. Pinkerton, and signed by David Fleet, former Assistant State Attorney. [5] As a result of his counsel's negotiations with the State, the Defendant was allowed to enter a plea to the lesser offenses under an Amended Information,

Furthermore, the Defendant entered into a negotiated plea as indicated by the written plea agreement.[6] The written plea agreement and the transcript of the sentencing hearing conducted on September 6, 2001, conclusively demonstrate that the Defendant knowingly and voluntarily entered a plea of nolo contendere to the amended information as indicated

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[4] Five Count Amended Information, attached hereto as Exhibit E.

[5] Letter dated August 24, 2001, regarding plea negotiation attached hereto as Exhibit F.

[6] *See*, Written plea agreement dated September 5, 2001, Exhibit B.

on the written plea agreement.[7]

Therefore, the Defendant is entitled to no relief on either allegation contained in ground one of the 3.850 Motion. Defense Counsel did not render ineffective assistance of counsel.

2. As to ground two of the 3.850 Motion, the Defendant asserts ineffective assistance of counsel and/or involuntary plea because defense counsel never advised Defendant of the sentencing guidelines, the recommended sentencing ranges or the sentencing scores sheet; therefore, the Defendant's plea amounted to an upward departure sentence.

During the evidentiary hearing, Mr. Pinkerton testified that he reviewed with Mr. Lowery the possibility that he could face life in prison if he was convicted[8] and the offer made by the State if the Defendant decided to enter a plea in lieu of trial.

The allegations of the Defendant do not meet the requirements of Strickland v. Washington, 466 US 668 (1984), which requires deficient performance and that the Defendant was prejudiced by the deficient performance. The Defendant has failed to establish either requirement and is entitled to no relief on this claim. Mr. Lowery's sentence was the result of a negotiated plea with a specific agreed upon sentence. During Mr. Pinkerton's testimony he clearly stated

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[7] Transcript of the Sentencing Hearing conducted September 6, 2001, attached hereto a Exhibit G.

[8] *See* evidentiary hearing transcript page 178.

he discussed the State's case and what charges would be brought at trial against the Defendant. Further, he discussed with the Defendant the fact that the plea offer would allow him to plea to lesser charges which would result in a lesser prison term.[9] The Defendant has failed to establish deficient performance and resulting prejudice; therefore, the Defendant's allegations contained in ground two of the motion are denied.

3. Ground three of the motion alleges that defense counsel rendered ineffective assistance of counsel and/or Defendant's plea was involuntarily given because defense counsel told Defendant that he would only have to serve ten years of this thirty-year sentence. Mr. Pinkerton testified during the evidentiary hearing that he discussed gain time with the Defendant; however, he never specifically guaranteed the Defendant a term of years or an amount of time that he would be required to serve.[10] Mr. Pinkerton stated that he told Mr. Lowery that he would be credited any gain time that he was eligible for under Florida law. Mr. Pinkerton further testified that he explained to the Defendant that based on gain time he would serve less than the thirty years of incarceration; however, he never specifically guaranteed a term of years to Mr. Lowery that would have to serve.[11]

The Court finds the testimony by Mr. Pinkerton during the evidentiary hearing to be credible, and the discussions

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[9] *See* evidentiary hearing transcript pages 178-179.

[10] Id.

[11] *See* Evidentiary hearing pages 177 through 178.

regarding gain time were not deficient in performance. Furthermore, the written plea agreement and the transcript of the sentencing hearing conclusively demonstrate that the Defendant's plea was knowingly and voluntarily entered.

4. The Defendant asserts in ground four of the 3.850 Motion, that defense counsel rendered ineffective assistance of counsel and/or defendant's plea was involuntary because defense counsel coerced Defendant to enter a guilty plea based on a misunderstanding regarding the maximum sentence. Mr. Pinkerton testified during the evidentiary hearing that he did in fact discuss that if the Defendant went to trial, he could face life sentences of twenty-five years before any possibility of parole for each of the two capital felonies for which Lowery was facing and if the Court were to run these consecutive, then the Defendant could conceivably die in prison, which is exactly what Mr. Pinkerton discussed with his client.[12]

It was not coercion nor did it render the plea involuntary for Mr. Pinkerton to discuss the maximum sentences that the Defendant could face if he proceeded to trial. Moreover, the written plea agreement and the transcript of the sentencing hearing conclusively demonstrate that the Defendant was not coerced into entering the plea.

5. As to ground five of the Motion, the Defendant alleges that defense counsel failed to inform Defendant that probation would run consecutive to incarceration and that he would be designated a sexual predator as a condition of this probation. The written plea agreement, the transcript of the

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[12] *See* evidentiary hearing transcript pages 178 through 180.

sentencing hearing and the testimony of Mr. Pinkerton during the evidentiary hearing regarding the discussions that he had with Mr. Lowery regarding the negotiated sentence clearly demonstrate that the Defendant is entitled to no relief.[13]

6. As to ground six alleging ineffective assistance of counsel for failure to inform the Defendant of a double jeopardy defense, this allegation is without merit. The Defendant alleges that the amended information that he pled to would allow him to raise a double jeopardy defense. The negotiated plea allowed the defendant to plea to lesser charges of Attempted Sexual Battery and Lewd and Lascivious Assault both in the same time frame. These are not the charges that Mr. Lowery would have faced at trial; therefore, he would not have been able to raise the defense of double jeopardy. The written plea agreement and the transcript of the sentencing hearing conclusively demonstrate that the Defendant is entitled to no relief.[14] The negotiated plea entered into by the Defendant waived the double jeopardy defense.

7. Ground seven of the Defendant's motion alleges that defense counsel was ineffective for failure to investigate, interview, and find essential defense witnesses. During the evidentiary hearing, Mr. Pinkerton testified that he did attempt to locate files and witnesses connected to early allegations without success due to the passage of time since the instances occurred. Additionally, Mr. Pinkerton testified that he did interview all essential witnesses to evaluate their

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[13] *See* Exhibits B, C, D and G.

[14] *See* Exhibits B and G.

credibility to determine the strength of the State's case.[15] No evidence was admitted during the evidentiary hearing to support this allegation; thus, the allegation is legally insufficient and the Defendant is entitled to no relief to this claim.

8. Ground eight of the 3.850 motion asserts that the Defendant's plea was not voluntarily entered. The Defendant asserts that the record does not show an intelligent and voluntary waiver of Mr. Lowery's constitutional rights. The written plea agreement and the of the sentencing hearing in which Mr. Lowery affirmed on the record that he read and understood the plea agreement, discussed it with his attorney and was satisfied with his attorney's representation conclusively refute this allegation; therefore, the defendant is entitled to no relief.

9. In ground nine of the Motion, the Defendant alleges ineffective assistance of counsel for failure to challenge the validity of Section 794.011(2), Florida Statutes (1992). This allegation is legally insufficient on its face. The defendant failed to present any legal basis to challenge the validity of this statute either in his motion nor presented any legal basis during the evidentiary hearing to challenge the validity of the statute.

10. Ground ten of the Defendant's Motion alleges ineffective assistance of counsel based on failure to raise alleged prosecutorial misconduct and/or conflict of interest. The Defendant alleges that the State, specifically, former Assistant State Attorney, David Fleet, threatened his sons if they did not testify against their father. During the evidentiary

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[15] *See* Evidentiary hearing transcript, pages 164-167, 180-183.

hearing, former Assistant State Attorney, David Fleet, testified that he tried to contact the sons as they were essential witnesses; however, Mr. Fleet testified that the sons were never threatened with prosecution or adverse actions.[16]

Further, the Defendant alleges that former Assistant State Attorney David Fleet, as a representative of the State, had an improper relationship and/or a conflict of interest. During the evidentiary hearing, Mr. Fleet testified that he did work on child advocacy matters with families and friends of the victims and that this relationship initially caused the victims family to contact Mr. Fleet at the time the allegations came to light. There was no showing or any evidence presented during the evidentiary hearing that this relationship in any way resulted in improper, unprofessional or unethical conduct on the part of Mr. Fleet.[17] The court finds the testimony of Mr. Fleet to be credible and that the defendant has failed to establish that there was prosecutorial misconduct and/or a conflict of interest on the part of Mr. Fleet; therefore, the Defendant has failed to establish deficient performance by Mr. Pinkerton for failure to raise the issue of alleged prosecutorial misconduct and/or conflict of interest. This allegation is legally insufficient and the Defendant is entitled to no relief as to this claim.

Therefore, it is

ORDERED and ADJUDGED that the Defendant's Motion for Postconviction Relief is hereby respectfully **DENIED**.

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[16] *See* Evidentiary hearing transcript pages 139 through 147.

[17] *See* Evidentiary hearing transcript, pages 139-160.

The Defendant is hereby advised that he has the right to take an appeal from this order within 30 days from the date of rendition hereof.

The Clerk of this Court shall immediately furnish the Defendant with a certified copy of this order, by Certified US Mail showing on the face thereof the date and time with the original hereof was filed in the office of this Court and shall note on the original hereof the date of service by an appropriate certificate of service.

DONE AND ORDERED in Okaloosa County, Shalimar, Florida this *3rd* day of *December*, 2004.

/S/G. Robert Barron
G. ROBERT BARRON
CIRCUIT JUDGE

Copies provided to:

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(SEAL) Clerk of Court Okaloosa County Florida
/S/ T. Lucky 7 Dec. 2004